**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A22-0425**

State of Minnesota,
Appellant,

vs.

Adam Lloyd Torgerson,
Respondent.

**Filed October 10, 2022**
**Affirmed**
**Reilly, Judge**

Meeker County District Court
File No. 47-CR-21-606

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Brandi L. Schiefelbein, Meeker County Attorney, John P. Fitzgerald, Assistant County Attorney, Litchfield, Minnesota (for appellant)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Melvin R. Welch, Welch Law Firm, LLC, Assistant Public Defender, Minneapolis, Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Larkin, Judge; and Reyes, Judge.

**NONPRECEDENTIAL OPINION**

**REILLY**, Judge

In this pretrial appeal from the district court's order suppressing evidence and dismissing charges against respondent, appellant argues that the district court erred as a

matter of law by ruling that the odor of marijuana did not provide probable cause for police to search respondent's vehicle. We affirm.

## FACTS

In July 2021, a Litchfield Police Department police officer initiated a traffic stop for a suspected equipment violation for a vehicle carrying a light bar.[1] The officer identified respondent Adam Lloyd Torgerson as the driver. The officer also saw a woman and a minor child sitting in the front passenger seat. The officer testified that while speaking with Torgerson, he "could smell a strong odor of burnt marijuana." A second officer then arrived on the scene. The first officer told the second officer that he "could smell marijuana and it wasn't rolling out of the vehicle." The first officer explained that in some cases, an officer can smell the odor of burnt marijuana "before you even get to the window." Here, however, the first officer could not smell the odor of marijuana before he walked up to the vehicle. The state's counsel asked the first officer how strong the odor of marijuana was "in terms of . . . a continuum." The first officer testified that the odor was neither overpowering nor faint. The first officer estimated that on a scale of one to ten, the odor was a "[f]ive." The second officer also testified that he could "immediately s[m]ell the odor of burnt marijuana coming from inside the vehicle." The second officer stated that it "definitely wasn't the faintest . . . and it definitely wasn't the strongest," and agreed that the odor of marijuana was "somewhere in the middle."

[1] The facts in this section derive from the evidence presented at the suppression hearing.

The officers asked the occupants to step out of the vehicle and conducted a vehicle search. The officers found three pipes; a clear plastic baggie containing a white, powdery substance; and a container holding a brown, crystal-like substance in the center console of the vehicle. The officers did not find any marijuana in the vehicle. The white, powdery substance and the brown, crystal-like substance both field-tested positive for methamphetamine.

Appellant State of Minnesota charged Torgerson with felony possession of methamphetamine paraphernalia in the presence of a minor child and fifth-degree felony possession of a controlled substance. Torgerson moved to suppress the evidence and dismiss the complaint for lack of probable cause. At the omnibus hearing, Torgerson argued that the officers illegally expanded the stop based solely on the odor of marijuana. The district court determined that the search of the vehicle was "not reasonable," and that there "was not probable cause to believe criminal activity was afoot to justify a warrantless search of [Torgerson's] vehicle." The district court determined that probable cause did not support the state's charges and dismissed the complaint. The state now appeals.

## DECISION

### I. Critical Impact

We consider as a threshold question whether the state is entitled to appellate review. *State v. Lugo*, 887 N.W.2d 476, 481 (Minn. 2016). The state's ability to appeal in a criminal case is limited. *Id.* (citation omitted). Dismissal of a complaint satisfies the critical-impact requirement because it impairs the state's ability to prosecute the charged offense. *State v. Trei*, 624 N.W.2d 595, 597 (Minn. App. 2001), *rev. dismissed* (Minn.

June 22, 2001). The district court's dismissal of the charge precludes any trial in this case; as a result, the critical-impact test is satisfied, and we proceed to a review on the merits. *See Lugo*, 887 N.W.2d at 481-86 (permitting appellate review on the merits once critical impact is established).

## II. Probable Cause

The United States and Minnesota Constitutions protect "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. A warrantless search is presumptively unreasonable unless it falls within one of the recognized exceptions to the warrant requirement. *State v. Milton*, 821 N.W.2d 789, 798-99 (Minn. 2012). "The state bears the burden of establishing the applicability of an exception [to the warrant requirement]." *State v. Licari*, 659 N.W.2d 243, 250 (Minn. 2003). Evidence obtained during an unconstitutional search or seizure must be suppressed. *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011).

One exception to the warrant requirement is the "automobile exception," which allows police officers to search a vehicle, including closed containers, when "there are facts and circumstances sufficient to warrant a reasonably prudent [person] to believe that the vehicle contains contraband." *State v. Lester*, 874 N.W.2d 768, 771 (Minn. 2016) (quotation omitted). Determining whether there is probable cause requires an objective inquiry that evaluates the totality of the circumstances in a particular case. *Id.* These circumstances include the reasonable inferences that law enforcement officers may make based on their training and experience. *State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011).

Additionally, "each incremental intrusion during a stop must be strictly tied to and justified by the circumstances which rendered the initiation of the stop permissible." *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (quotations omitted). An intrusion not strictly tied to the circumstances that made the initial stop permissible must be supported by "at least a reasonable suspicion of additional illegal activity." *State v. Smith*, 814 N.W.2d 346, 350 (Minn. 2012).

The state argues that the officers had probable cause to search Torgerson's vehicle for controlled substances because there was probable cause to believe he was driving while impaired. Both officers testified that when they approached the vehicle, they smelled a strong odor of burnt marijuana coming from inside the vehicle. Minnesota law recognizes that the odor of marijuana coming from a vehicle can establish probable cause for a vehicle search. *See State v. Schultz*, 271 N.W.2d 836, 837 (Minn. 1978) (stating that the automobile exception applies when an officer smells marijuana emanating from a car); *see also State v. Thiel*, 846 N.W.2d 605, 609 (Minn. App. 2014) (holding that a vehicle search was justified because the officer "detected a 'strong' and 'overwhelming' odor of marijuana emanating from the vehicle"), *rev. denied* (Minn. Aug. 5, 2014).

The district court rejected the state's argument, determining that while the police officers had an objective basis to stop the vehicle for an equipment violation, they "had no probable cause that a search of the automobile would result in the discovery of evidence or contraband." The district court determined that a smell of marijuana alone is not enough to support probable cause, particularly since the Minnesota Legislature decriminalized marijuana in 1976. We do not reach the issue of whether the odor of marijuana, alone, is

enough to establish probable cause, because after evaluating the totality of the circumstances in this particular case, we agree that the state lacked probable cause to conduct a vehicle search.

Here, the officer stopped Torgerson's vehicle because it had a light bar mounted to its grill and the officer believed the number of lights exceeded the number allowable by Minnesota law. The officer testified he did not see Torgerson commit a traffic violation or drive in an unsafe or erratic manner. *Cf. Thiel*, 846 N.W.2d at 609-11 (determining that officer had probable cause because defendant was speeding and handed officer a ceramic smoking pipe with a small amount of partially burnt marijuana). The first officer approached the vehicle and smelled a strong odor of marijuana. He did not recall noticing whether Torgerson had bloodshot eyes or other indicia of impairment. The second officer also smelled the odor of burnt marijuana coming from inside the vehicle. Other than the smell, however, the second officer agreed that neither he, nor the first officer, had observed any indicia of impairment or intoxication of either Torgerson or his passenger. The record contains no evidence that Torgerson was nervous, evasive, or engaged in furtive gestures while inside the vehicle. *Cf. State v. Ortega*, 749 N.W.2d 851, 853-54 (Minn. 2009) (holding that officer had probable cause to search vehicle based on defendant's nervous and evasive conduct and because defendant handed officer a small amount of marijuana), *aff'd*, 770 N.W.2d 145 (Minn. 2009). And the officers testified they did not see any evidence of drugs or drug paraphernalia sitting in plain sight. Given the totality of the circumstances, the officers did not have the requisite probable cause to believe that a search of the vehicle would reveal evidence of a crime or contraband.

## III. The District Court's Order

While we affirm the district court's suppression decision, we note some concerns with the district court's order. The district court judge's role is to act as an "impartial decision-maker and objective observer." *State v. Malone*, 963 N.W.2d 453, 468 (Minn. 2021). But here, the district court made several findings of fact that are based on information outside the record, based its conclusions of law on these improper findings, and drafted a memorandum that raises concerns regarding the judge's partiality.

***The District Court's Findings of Fact***

We review the district court's factual findings for clear error. *State v. Stavish*, 868 N.W.2d 670, 677 (Minn. 2015). A clear error occurs when there is no reasonable evidence supporting the finding. *State v. Evans*, 756 N.W.2d 854, 870 (Minn. 2008) (quotation omitted). Here, the district court made several factual findings that are not supported by any evidence in the record and thus are clearly erroneous. For example, the district court made a factual finding that "different strains [of marijuana] have different odors," and that "[t]he quantity, strain[,] and quality have a lot more to do with odor than whether the marijuana has been burnt or not. The human nose simply does [not] have sufficient nerve endings to differentiate quality or quantity, smoked or unsmoked marijuana." The district court found that "[t]he odor of marijuana can linger on the clothes and hair of people who have smoked marijuana or been around someone who has smoked marijuana." And the district court discussed the policies of the Minnesota Department of Health and marijuana "flowers" for prescription use of marijuana. The district court also stated that "there are

vast numbers of citizens who use and possess non-criminal amounts of marijuana." The record does not provide evidentiary support for these findings.

***The District Court's Conclusions of Law***

We review questions of law de novo. *State v. Scovel*, 916 N.W.2d 550, 554 (Minn. 2018). The district court's conclusions of law should be grounded in the facts in the record. *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012). Here, the district court stated several conclusions of law that are not meaningfully tied to its factual findings or are irrelevant to the issue presented. Specifically, the district court made conclusions of law related to dog-sniff searches in other jurisdictions and discussed "corroborated information provided by a confidential informant." Because the officers did not conduct a dog-sniff search or use information supplied by a confidential informant, we reject these conclusions as irrelevant.

***The District Court's Memorandum***

We note, finally, that the district court's memorandum is filled with statements that could reasonably cause a reader to question the court's impartiality. The district court begins by stating that the court "has watched in amazement as our society turns from the community policing model to paramilitary-style policing." The memorandum made a global statement faulting local police departments for failing to train their officers on "compassionate conflict resolution" and instead offering "SWAT training." The district court states that this difference is "obvious and concerning." The district court maligns the officers for conducting a traffic stop and search of a vehicle in the presence of a young child. The memorandum asks, "Does anyone involved think that this child will grow up to believe law enforcement is here to serve and protect? Can these officers see how their

actions did not help and may have contributed to societal harm?" The district court made questionable statements about the integrity of the police officers generally and the two arresting police officers personally.

We are troubled by these comments, which are highly subjective and cast doubt on the impartiality of the judiciary. We reject each of the district court's gratuitous comments. Yet despite our concerns about the district court's unconventional approach to the issue, for the reasons set forth above and based on our review of the totality of the circumstances in this case, we affirm.

**Affirmed.**